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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NEDLOG COMPANY, an Illinois  
Corporation,

Plaintiff,

vs.

ADIR RESTAURANTS  
CORPORATION, a California  
Corporation,

Defendant.

Case No.: 2:11-cv-05284-ABC

**ADIR RESTAURANTS  
CORPORATION'S EX PARTE  
APPLICATION TO STAY  
ENFORCEMENT OF JUDGMENT  
PURSUANT TO RULE 62(B)(4) OF  
THE FEDERAL RULES OF CIVIL  
PROCEDURE**

[Filed Concurrently with Declaration Of  
Saman M. Rejali; Declaration of  
Elizabeth Van Horn; Declaration of  
Carlo Divita; and [Proposed] Order]

Judge: Hon. Audrey B. Collins  
Courtroom: 680

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT Defendant Adir Restaurants, Corp. (“Adir”)  
3 will and hereby does apply to this Court *ex parte* for an Order staying enforcement of  
4 the judgment registered in the Central District of California on June 9, 2011, and  
5 assigned to this court on June 27, 2011, pending consideration of Adir’s forthcoming  
6 Motion for Relief from Judgment pursuant to Rule 60(B)(4) and 60(B)(6) of the  
7 Federal Rules of Civil Procedure. Adir intends to file its Rule 60 motion once it has  
8 completed its meet and confer with counsel for Nedlog Company (“Nedlog”). In the  
9 alternative, Adir applies to this Court for an Order to shorten time to hear Adir’s  
10 Motion for Relief from Judgment pursuant to Rule 60(B)(4) and 60(B)(6).

11 This *Ex Parte* Application is brought pursuant to Local Rule 7-19 and ¶ 6 of the  
12 Court’s Procedures and Schedules, and ¶ 5 of this Court’s “Order re Pretrial  
13 Conference” on the grounds that good cause exists to stay enforcement of the judgment  
14 pending a ruling on Adir’s forthcoming Motion for Relief from Judgment pursuant to  
15 Rule 60(B)(4) and 60(B)(6) of the Federal Rules of Civil Procedure. This request is  
16 being brought *ex parte* because Adir will suffer irreparable injury if a hearing is set  
17 according to regular noticed motion procedures. *See* Declaration of Carlo Divita  
18 (“Divita Decl.”), ¶ 6. Additionally, Adir is without fault in creating this crisis, having  
19 contacted its counsel to discuss its options upon receiving a notice of levy with writ of  
20 execution attached on July 7, 2011. *See* Declaration of Elizabeth Van Horn (“Van  
21 Horn Decl.”), ¶ 6.

22 Pursuant to Local Rule 7-19, on July 11, 2011, counsel for Adir gave notice of  
23 its intent to file this *Ex Parte* Application by leaving a detailed voice message  
24 indicating the relief sought for counsel for Nedlog, Bruce J Zabarauskas  
25 of Crowell & Moring LLP (telephone: (949) 263-8400; address: 3 Park Plaza  
26 Twentieth Floor, Irvine, CA 92614-8505)). *See* Declaration of Saman M. Rejali  
27 (“Rejali Decl.”), ¶ 2. Counsel for Adir also informed counsel for Nedlog that any  
28 opposition should be filed within 24 hours of service by facsimile. Rejali Decl., ¶ 2.

1 Counsel for Nedlog has indicated that they intend to oppose the application. Rejali  
2 Decl., ¶ 2.

3 This Application is based on the attached Memorandum of Points and  
4 Authorities, the Declarations of Elizabeth Van Horn, Saman M. Rejali, and Carlo  
5 Divita, as well as all pleadings, records and files in this action, together with such oral  
6 and documentary evidence as may be presented at the time of any hearing on this  
7 Application.

8  
9 K&L GATES LLP

10  
11 Dated: July 12, 2011

By: /s/ Saman M. Rejali  
Attorney for Adir Restaurants Corp.  
E-mail: saman.rejali@klgates.com

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           Adir Restaurants Corp. (“Adir”), by and through its attorneys, K&L Gates LLP,  
3 and in support of its Ex Parte Application to Stay the Enforcement of Judgment  
4 Pursuant to Rule 62(b)(4) of the Federal Rules of Civil Procedure, states as follows:

5   **I. INTRODUCTION AND FACTUAL BACKGROUND**

6           On May 3, 2011, The Nedlog Company (“Nedlog”) obtained a \$148,497.44  
7 arbitration award against Adir Restaurants Corp. (“Adir”) resulting from an American  
8 Arbitration Association (“AAA”) arbitration proceeding conducted in Illinois in March  
9 2011. The arbitration concerned a contract under which Illinois-based Nedlog  
10 provided beverage-dispensing equipment and beverage mixes to Adir for use in Adir’s  
11 quick-service “Pollo Campero” restaurants in Southern California. The Northern  
12 District of Illinois entered Judgment confirming the award on May 26, 2011, and  
13 certified the judgment for registration in another district on June 6. The judgment was  
14 registered in the Central District of California on June 9, 2011 and assigned to this  
15 Court on June 27.

16           As explained in Section II of this Application, Nedlog violated several Rules  
17 and Statutes in the process of confirming the arbitration award and registering the  
18 judgment in the Central District of California. As a result, Nedlog has been allowed to  
19 proceed with its efforts to enforce its arbitration award against Adir through writs of  
20 execution and levies on Adir’s accounts and assets, in violation of express provisions  
21 of the Federal Arbitration Act (“FAA”), 28 U.S.C. § 1963 and the Federal Rules of  
22 Civil Procedure.<sup>1</sup>

23           While Nedlog is attempting to enforce its arbitration award against Adir by  
24 freezing and levying Adir’s assets, Adir still has until August 3, 2011 to move to  
25 modify the award. As set forth below, Adir is likely to succeed in modifying the  
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27   <sup>1</sup> Specifically, Nedlog failed to comply with the service requirements of the FAA by  
28 serving its petition for confirmation on Adir, a nonresident, by certified mail and  
email, and ignored the time periods provided by 28 U.S.C. § 1963 in seeking  
certification before Adir’s time to appeal had expired.

award, because as it stands now, Nedlog has received a significant windfall, representing nearly one-third of the award. Therefore, a stay is necessary to avoid further violation of Adir's rights and unnecessary litigation costs in attempting to retrieve portions of the award that may be reduced by modification. In other words, if Nedlog collects the entire award, and Adir successfully modifies the arbitration award, Adir will have its own judgment to enforce against Nedlog, requiring additional and needless litigation. This Court can administer this case more efficiently by granting a stay.

**II. THIS COURT SHOULD GRANT ADIR'S MOTION FOR A STAY WITHOUT A BOND BECAUSE THE COLLECTIONS PROCESS IS SIMPLE, THE DISPUTE WILL BE RESOLVED QUICKLY, ADIR IS ABLE TO PAY THE JUDGMENT, AND ADIR'S FORTHCOMING RULE 60 MOTION IS LIKELY TO SUCCEED.**

Rule 62(b)(4) of the Federal Rules of Civil Procedure specifically provides that enforcement of a judgment should be stayed pending a motion for relief from a judgment under Rule 60. Fed. R. Civ. P. 62(b)(4). There is no requirement that Adir post a bond for this court to issue a stay. *Arban v. West Publ'g Corp.*, 345 F.3d 390, 409 (6th Cir. 2003). Issuance of a stay without requiring a bond is particularly appropriate in this case.

Courts consider the following factors, among others, when determining whether to issue a stay without a bond: "1) the complexity of the collection process; 2) the amount of time required to obtain a judgment after it is affirmed on appeal; 3) the degree of confidence that the district court has in the availability of funds to pay the judgment; 4) the defendant's ability to pay the judgment is so obvious that to require a bond would be a waste of money; and 5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position." Moore's Fed. Prac. 3d Ed. § 62.03[2], citing *Dillon v. Chicago*, 866 F.2d 902, 905 (7th Cir. 1989); *see also Arban*, 345 F.3d at 409

1 (granting stay without bond based on disparity between defendant's annual revenue to  
2 pay and amount of judgment). Courts also consider the likelihood of success on the  
3 merits. *U.S. v. Moyer*, 2008 U.S. Dist. LEXIS 63995 (N.D. Cal. Aug. 12, 2008)

4 Addressing these factors in turn, a stay is particularly prudent in this case. First,  
5 the collection process simply entails Adir issuing a check to Nedlog for the amount of  
6 the award. Second, Adir's Rule 60 motion presents four procedural issues for the  
7 Court's review; disposition of this dispute should occur in a short period of time.  
8 Accordingly, the risks normally present in the issuance of a stay without a bond in a  
9 long appeal process are not present, and Nedlog's ability to collect on its arbitration  
10 award is not jeopardized.

11 The last three factors are easily disposed of. The amount of money at stake is  
12 not exorbitant (\$148,977.44). As the attached declaration sets forth, Adir is in the  
13 possession of approximately \$165,000 in liquid, unencumbered assets. Declaration of  
14 Carlo Divita ("Divita Decl."), ¶ 3. A stay is particularly prudent in this instance due to  
15 the strength of Adir's arguments regarding propriety of service in the Northern District  
16 of Illinois and the impropriety of Judge Shadur's decision, in addition to the clear error  
17 in the arbitration award. *See Moyer*, 2008 U.S. Dist. LEXIS 63995 (granting stay  
18 without bond under Rule 62(b) due in part to movant's likelihood of success on the  
19 merits). Further, Adir "need not demonstrate that [it] will succeed on the merits, but  
20 must at least show that [its] cause presents serious questions of law worthy of  
21 litigation." *Moyer*, 2008 U.S. Dist. LEXIS, at \*16-17 (citing *Topanga Press, Inc. v.*  
22 *City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993)).

23 Nedlog petitioned the Northern District of Illinois to confirm the arbitration  
24 award prior to the expiration of the time in which Adir is allowed to move to vacate the  
25 award under Section 12 of the FAA.<sup>2</sup> In the process, Nedlog failed to serve Adir  
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27 <sup>2</sup> Under Section 12 of the FAA, Adir may move to vacate the order in a United States  
28 District Court within three months of that date, or by August 3, 2011. 9 U.S.C. § 12.  
Nedlog's initial application to confirm the award was filed on May 12 (and "served"  
by e-mail), an amended application was filed on May 20, 2011 (and "served" by

properly with its petition, choosing instead to notify Adir of the confirmation hearing by certified mail, which reached Adir in California a mere three days before the hearing in Illinois.<sup>3</sup> See Declaration of Elizabeth Van Horn (“Van Horn Decl.”), ¶ 5. Nedlog then moved to certify the judgment for registration in this Court before Adir’s time to appeal had expired, in violation of 28 U.S.C. § 1963.<sup>4</sup> The District Court for the Northern District of Illinois allowed Nedlog to proceed down this path despite challenges from Adir to the service and timing of Nedlog’s pleadings. In addition, not only were both the confirmation of the arbitration award and the certification and registration of that judgment entered prematurely, but the actual amount of the judgment resulted in a windfall to Nedlog of roughly \$50,000.<sup>5</sup> Now, Nedlog is

certified mail, which Adir received on May 23), and the Illinois judgment was entered on May 26, 2011. See Rejali Decl., Exhs. A, B, D.

<sup>3</sup> It is well-settled that e-mail or certified mail, the only methods used by Nedlog, does not constitute “delivery” under Rule 4. *Dunmars v. City of Chicago*, 22 F. Supp. 2d 777, 781 (N.D. Ill. 1998). Nedlog also failed to effectuate proper service under Rule 4(h)(1)(A), which allows service on a corporation by complying with the law of the state in which the district is located under Rule 4(e)(1). Fed. R. Civ. P. 4(h)(1)(A) & 4(e)(1). Under Illinois law, service by certified mail or e-mail is not proper on corporations – or individuals, for that matter – and instead must be personally served on an agent within the state or “in any manner now or hereafter permitted by law.” 735 Ill. Comp. Stat. 5/2-204. Service by certified mail or e-mail does not constitute “any other manner now or hereafter permitted by law” under Illinois or Federal Rules.

<sup>4</sup> A judgment shall not be certified for registration in another district prior to the expiration of the time for filing an appeal. 28 U.S.C. § 1963; see also *Occidental Fire & Casualty Co. of North Carolina v. Great Plains Cap. Corp.*, 912 F.Supp. 515 (S.D. Fla. 1995) (stressing impropriety of entering judgment prior to appeal deadline and highlighting the procedural conflicts such entry creates); *Armstrong v. Armstrong*, 130 F.R.D. 449, 455 (Dist. Colo 1990) (same). Here, the time for Adir to appeal the judgment confirming the arbitration award did not expire until thirty (30) days of its entry on May 26, 2011 – i.e., until June 25, 2011. The Illinois court certified the award on June 6, 2011. Although Adir chose not to appeal the judgment, the Illinois court’s certification was nonetheless improper and should be vacated.

<sup>5</sup> Specifically, Nedlog is in the possession of soft drink mix that the arbitrator ruled Adir was required to purchase under the contract. Under the contract, Adir would have paid Nedlog for the mix, and Nedlog would have delivered the mix to Adir. The arbitration award contemplated and included payment from Adir to Nedlog for the soft drink mix (worth \$41,889.75). However, the arbitrator failed to require Nedlog to deliver the soft drink mix to Adir, thus resulting in a windfall of nearly \$42,000 to Nedlog. Accordingly, enforcing a judgment based on this award would create the inequitable circumstance where Nedlog receives payment for goods it never delivered.



1 flaunting a writ of execution issued by this Court, while Adir has been stripped of  
2 important rights expressly provided to it under the FAA. This Court is in a position  
3 and has the authority to remedy this violation of Adir's rights.

4 Finally, while Nedlog is not harmed by a brief stay of the enforcement  
5 proceedings, Adir is in position to be unnecessarily and unduly harmed in the event  
6 Nedlog collects or freezes Adir's assets, affecting routine payroll commitments and  
7 expenses, among other things. Divita Decl. ¶ 6. In sum, there is little harm in staying  
8 the proceedings pending disposition of this motion, while there is substantial harm that  
9 may arise if Nedlog is allowed to enforce its award. A stay would prevent these harms  
10 to Adir and promote efficiency in the administration of this case.

11 WHEREFORE, Adir respectfully requests this Court stay to the enforcement of  
12 the judgment in this case pending disposition of its forthcoming Rule 60 motion.

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15 K&L GATES LLP

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17 Dated: July 12, 2011

18 By: /s/ Saman M. Rejali  
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